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March 12, 2004

**VIA UPS AND ELECTRONIC MAIL**

Mary Cottrell, Secretary  
Massachusetts Department of  
Telecommunications and Energy  
One South Station  
Boston, MA 02110

**Re: D.T.E. 03-60: Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers.**

**Comments on the Expedited Motion of Verizon Massachusetts Inc. to Stay Track A of This Proceeding.**

Dear Ms. Cottrell:

Choice One Communications Corporation of Massachusetts Inc. ("Choice One"), and Focal Communications Corporation of Massachusetts ("Focal"), through their attorneys, hereby submit the following comments to the Massachusetts Department of Telecommunications and Energy ("Department") on the Expedited Motion to Stay Track A ("Motion") filed on March 3, 2004 by Verizon Massachusetts Inc. ("Verizon") in the above-captioned docket. In its Motion, Verizon seeks an immediate stay for 60 days of the Department's proceeding regarding the Federal Communications Commission ("FCC")'s Triennial Review Order ("TRO") in light of the decision issued by the United States Court of Appeals for the District of Columbia.<sup>1</sup>

Critically, Choice One and Focal would like the Department to note that the *USTA II* decision is not currently in effect.<sup>2</sup> Several parties, including the FCC, have indicated their intent

<sup>1</sup> See *United States Telecom Association v. Federal Communications Commission* (Docket No. 00-1012) (DC Circuit March 2, 2004) ("*USTA IP*").

<sup>2</sup> *Id.*, at 62 (noting that the portions of the TRO vacated by the DC Circuit will be stayed until "no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from today's date").

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to seek a stay of the *USTA II* decision from the United States Supreme Court. In order to ensure that the most complete factual record is available, Choice One and Focal are prepared to proceed as scheduled with the hearings in this docket. As such, Choice One and Focal recommend that the Department deny Verizon's Motion and continue with the proceeding.

The Department has the legal authority to continue with this proceeding by virtue of the authority granted to it under the General Laws of Massachusetts. Pursuant to the General Laws of Massachusetts, the Department has supervision and oversight over common carriers, including telecommunications carriers.<sup>3</sup> As part of its supervisory role, the Department may inquire into "the rates, charges, regulations, practices, equipment and services of common carriers in this commonwealth."<sup>4</sup> This proceeding involves precisely that, the practices and services of common carriers in the commonwealth. Based on this authority, the Department is permitted under Massachusetts law to proceed with its investigation into the unbundling of mass market switching, dedicated transport and high capacity loops.

In addition, section 251(d)(3) of the Communications Act of 1934, as amended ("Act") further permits the Department to continue with its proceeding. Section 251(d)(3) preserves the right of state commissions to implement rules regarding access and interconnection obligations of local exchange carriers, so long as the rules are consistent with federal law.<sup>5</sup> Until such time as there are new federal rules regarding unbundling, there is a complete void of rules governing Verizon's practices for unbundling network elements. As a result, it would not be in the best interests of consumers in Massachusetts if the Department were to take a "wait and see" approach with respect to the *USTA II* decision. Continuing the proceeding would further the goal of establishing access and interconnection obligations of local exchange carriers. At a minimum, the Department should ensure that all current network elements that are unbundled in currently effective interconnection agreements remain available to competitive carriers in Massachusetts, until such time as the Department can enact its own rules governing interconnection and

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<sup>3</sup> MASS. GEN. LAW ch. 159 § 12.

<sup>4</sup> MASS. GEN. LAW ch. 159 § 13.

<sup>5</sup> See 47 U.S.C. § 251(d)(3)(A)-(C). Specifically, section 251(d)(3) states

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

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unbundling in Massachusetts. Given that there are no federal rules, it can hardly be said that rules enacted by the Department would be inconsistent with federal law. Under federal law, the Department may continue with the proceeding.

Choice One and Focal appreciate the uncertainty created by the *USTA II* decision. If the Department is inclined to temporarily defer the proceeding, Choice One and Focal would recommend that the Department follow the approach the Florida Public Service Commission has adopted in its loop and transport case ("Florida Approach").<sup>6</sup> In order to ensure the record in the proceeding is as complete as possible, Choice One and Focal propose the following: (1) the parties agree to stipulate to the admission of all pre-filed testimony and associated exhibits into the record of the proceeding; (2) the Department enters into the record of this proceeding all pre-filed testimony and associated exhibits filed by the parties; (3) the parties agree to reserve the right to cross examine the witnesses should the proceeding recommence; (4) the Department holds the proceeding in abeyance, pending the outcome of the various appeals of the *USTA II* decision and any FCC action; and (5) the Department schedules a status conference for 30 days after the issuance of its order holding the proceeding in abeyance to update the status of the TRO. Choice One and Focal do not oppose the continuation of Track B (batch hot cuts) should the Department decide to stay the Track A portion of the proceeding.

An original and nine copies of this letter are enclosed. Also enclosed is a duplicate and a self-addressed postage-paid envelope. Please date-stamp the duplicate and return it in the enclosed envelope. Should you have any questions, please do not hesitate to contact Erin Emmott at (202) 955-9766.

Respectfully submitted,



Steven A. Augustino  
Erin W. Emmott

*Counsel for Choice One Communications Corporation  
of Massachusetts Inc. and Focal Communications  
Corporation of Massachusetts*

cc: D.T.E. 03-60 Service List (via email)

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<sup>6</sup> *Implementation of Requirements Arising from Federal Communications Commission's Triennial UNE Review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport*, FL PSC Docket No. 030852-TP.